John J. Canova d/b/a Canova Moving & Storage Co. *and* General Teamsters and Warehousemen, Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-CA-10811 and 20-CA-10992

April 30, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 4, 1980, Administrative Law Judge David G. Heilbrun issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed limited exceptions and exceptions, respectively; each filed supporting briefs; the General Counsel filed a brief in opposition to the Respondent's exceptions; and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified below.

The General Counsel excepts, *inter alia*, to the Administrative Law Judge's including, as interim earnings for the purposes of calculating the Respondent's backpay liability to O. D. Phillips, any portion of the awards made in favor of Phillips by the California Workers' Compensation Appeals Board as a result of back injuries which he sustained while employed by the Respondent as a driver engaged in the moving of household goods. We find merit in this exception on the facts and for the reasons set forth below.

Phillips was employed by the Respondent from May 1974 until January 5, 1976, when he was unlawfully discharged. Meanwhile, in 1975 Phillips sustained three job-related back injuries. The last, which occurred on September 11, rendered him unable to work for the remainder of the month. During this recuperative period, Phillips, who was under the care of a local physician, received temporary total disability indemnity.[2] In October, Phillips returned to work and remained continuously employed until his unlawful discharge the following January.

During 1976 and 1977, Phillips gained interim employment on an intermittent basis, masking, when necessary, the discomfort he experienced which resulted from his prior injuries. In the latter year, Phillips also initiated three workers' compensation claims based on the 1975 episodes mentioned above. In support of these claims, Phillips was examined by Dr. Gregory Bard, a physician, on November 15, 1977. Bard furnished Phillips' attorney a written report of his findings and conclusions in which he stated that Phillips' symptomatology became "moderate to severe when engaged in repetitive heavy lifting, twisting and bending activities" and that his injuries would preclude him from resuming full-time employment in his former capacity.[3]

Pursuant to the Respondent's request, Phillips was subsequently examined by Richard C. Reiswig, a chiropractor who performs disability evaluations in workers' compensation cases. Based on this examination, Dr. Bard's earlier report, Phillips' prior medical records, and, further, taking into account the effects of Phillips' interim employment, Dr. Reiswig concluded that Phillips "has residual partial permanent disability which would preclude him between 'no heavy lifting repetitive bending or stooping and no heavy work.'" Reiswig so advised the Respondent's attorney in a report dated March 9, 1978.[4]

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Insofar as is relevant to this proceeding, Phillips neither claimed nor received further temporary disability indemnity as a result of these injuries.

[3] The General Counsel conceded, the Administrative Law Judge found, and we agree that the Respondent's liability for backpay as a result of Phillips' unlawful discharge terminated on November 15, 1977, when Phillips was examined by Dr. Bard and found, as of that time, to be physically unable to resume employment in his former capacity.

[4] In a supplemental report, dated June 30, 1978, Dr. Reiswig gave his opinion concerning an "apportionment" of the "residual factors of disability." Therein, and subsequently at the hearing in this proceeding, he stated that 30 percent of the disability found was due to work requirements after the last injury (in September 1975) giving rise to the workers' compensation claims in question, the liability for which should therefore be divided equally between the Respondent and Phillips' interim employer. Apparently misled by this opinion, the Administrative Law Judge erroneously sought to adjust, by means of a *further* apportionment, the aggregate amount of the workers' compensation awards ultimately obtained by Phillips as an interim earnings offset against the Respondent's backpay liability. As the sums awarded to Phillips were computed *after* apportionment was taken into account, it is clear that the adjustment made by the Administrative Law Judge was inappropriate. However, in view of our decision, *infra*, we find it unnecessary to correct his computations in this respect.

At the hearing in this proceeding, Dr. Reiswig also expressed his opinion that, based on his evaluation of Phillips' medical records, he would not have permitted Phillips to return to work after September 1975. Nevertheless, the Administrative Law Judge held that this opinion concerning Phillips' physical condition does not extinguish the Respondent's

Continued

After a hearing before the California Workers' Compensation Appeals Board, the latter, on September 19, 1978, issued its findings and awards in the three cases, in which it determined that the injuries in question had caused Phillips permanent disability. Based on its apportionment of Phillips' overall permanent disability to the three injuries in question, the Appeals Board awarded Phillips over 91 weeks of permanent disability indemnity in the net aggregate amount of $5,770.25.[5]

A controversy has arisen over how much, if any, of this sum may be offset as interim earnings from backpay otherwise due Phillips. As the Administrative Law Judge correctly observed, the Board, in *American Manufacturing Company of Texas*,[6] held that workers' compensation payments are deductible insofar as they constitute payment for wages lost by a discriminatee during a backpay period; but, to the extent that such payments constitute reparation for physical damage suffered, they are, as a collateral benefit unrelated to wages, excluded from the computation of interim earnings.

A resolution of the controversy before us, therefore, requires that we determine the nature of the payments made to Phillips under the awards of the California Workers' Compensation Appeals Board. We find this question answered in *Russell* v. *Bankers Life Company*.[7] Therein, the court stated:

> There are two basic classifications of Workmen's Compensation disability benefits: temporary and permanent. Each type of benefit is designed to compensate for a different type of loss. "Permanent disability is distinct from temporary. The primary element in temporary disability is the loss of wages, whereas loss of earning power is not a prerequisite to the right to permanent disability; permanent bodily impairment is the prime consideration in determining right to permanent disability." . . . In other words, temporary disability payments are a substitute for lost wages . . . during the temporary disability period, while permanent disability is for permanent bodily impairment and is designed to indemnify for the insured employees' impairment of future earning capacity or "diminished ability to compete in the open labor market."[8]

In light of the foregoing, and as the entire aggregate amount paid to Phillips under the awards in question was in the form of a permanent disability indemnity, it is clear that the $5,770.25 thus paid was not a substitute for lost wages which may be offset against backpay due Phillips as a result of his unlawful discharge. Further, as the only temporary total disability payments Phillips received are allocable to a period (September 1975) which falls outside the backpay period, those payments are likewise excluded as an interim earnings offset.[9]

Therefore, we find that the total net backpay due Phillips is $12,744.01, as shown in the revised Appendix B attached hereto. We shall modify the Administrative Law Judge's recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein and set out in full below, and hereby orders that the Respondent, John J. Canova d/b/a Canova Moving & Storage Co., Yuba City, California, his agents, successors, and assigns, shall pay to Tim Davis the sum of $7,953.26 and to O. D. Phillips the sum of $12,744.01, together with interest as appropriately fixed and compounded.[10]

backpay liability. We agree. Indeed, Phillips did return to work and remained employed without incident until his unlawful discharge. It is a matter for speculation as to how much time might have passed before Phillips' deteriorating condition would have caused him to cease working as a driver for the Respondent. Notwithstanding the testimony of Dr. Reiswig, we find that the Respondent failed to prove by a preponderance of the evidence that this would have occurred before Phillips' November 15, 1977, physical examination (see fn. 3, *supra*).

[5] The Appeals Board found against Phillips in a fourth case not relevant to this proceeding.

[6] 167 NLRB 520 (1967).

[7] 46 Cal. App. 3d 405, Court of Appeals, 2d District, Div. 5, 120 Cal. Rptr. 627 (1975).

[8] *Id.* at 633–634.

[9] *American Manufacturing, supra.*

[10] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX B - Phillips

Year/Qtr	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
1976/I	$2,384.74	$490.00	0	$490.00	$1,894.74
1976/II	2,794.56	0	0	0	2,794.56
1976/III	3,027.59	4,022.98	0	4,022.98	0
1976/IV	2,703.03	746.16	0	746.16	1,956.87
1977/I	2,275.58	0	0	0	2,275.58

APPENDIX B - Phillips—Continued

Year/Qtr	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
1977/II	2,872.87	0	0	0	2,872.87
1977/III	2,479.64	5,710.21	0	5,710.21	0
1977/IV	1,605.52	656.13	0	656.13	949.39
TOTAL BACKPAY:					$12,744.01
REIMBURSABLE MEDICAL AND DENTAL EXPENSES:					$65.60

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge: In April 1978 Respondent formally stipulated with the General Counsel that it had no objection to the concededly "valid and proper" Decision and Order reported at 227 NLRB 1834, reserving only an entitlement to adjudicate disagreement as to amounts of backpay due Tim Davis and O. D. Phillips under terms of the Board's Order. Pursuant to this stipulation and a second amended backpay specification dated July 9, 1979, the matter was heard at Yuba City, California, on October 10 and 11, 1979. There are four chief issues in this supplemental proceeding: (1) Whether backpay was tolled on or about February 1, 1976, by such offers of reinstatement as were communicated toward Davis and Phillips by Respondent around that time, (2) whether the General Counsel was correctly departed from an "adjusted average hours formula" in computing backpay for Davis only as to the first quarter of 1976 (1976/I) because that was a "destabilized" period in Respondent's continuing employment of moving and storage helpers, (3) whether Davis and Phillips had engaged in a diligent search for work throughout their backpay period, and (4) whether Phillips was physically disabled to a degree constituting unavailability for work during all or part of his backpay period.

Upon the entire record, including my observation of witnesses and consideration of posthearing briefs,[1] I make the following:

FINDINGS OF FACT AND CONCLUSIONS

On January 31, 1977, the Board adopted an Administrative Law Judge's Decision that Respondent, a proprietorship engaged in moving and storage of household goods, had unlawfully discharged Davis and Phillips on January 5, 1976, from their respective positions of helper and driver. These discharges had occurred in a setting of pending representation petitions upon which an election was conducted January 9, 1976. A subsequent work stoppage and attendant commencement of picketing occurred on January 15, 1976, coupled with contemporaneous written demand by former Union Business Representative Jack C. Black that various employees by appropriately returned to work. This request was parried a week later by Jack M. Harper, who wrote as follows on January 21, 1976:

> Replying to your letter dated January 14, 1976, please be advised the Employer did not terminate the employment of any individual named in your letter. Each individual walked off the job January 13, 1976, and none have returned.
>
> As to your assertion that these individuals are ready, willing and able to return to work, please be advised the Employer will accept any individuals named in your letter who report for work immediately provided permanent replacements have not been hired. The same terms and conditions of employment that existed prior to January 13, 1976 exist today, and any returning employee will be subject to those conditions.
>
> As to your claim to back wages for those individuals named in your letter, they are not entitled to any and none shall be forthcoming.
>
> The statement in your letter alleging the Union was certified by the NLRB as the authorized bargaining representative of the employees by the referenced firm is erroneous. No such certification has issued. Moreover, it is our contention the election conducted January 9, 1976 should be set aside because of misconduct by the Union's representative and the Board Agent assigned to conduct the election.
>
> In conclusion please be further advised Redwood Employers Association functions as the duly authorized representative of the referenced firm in matters related to employee wages, hours and other conditions of employment. Accordingly, any further communications with regards to these matters must be directed to the undersigned.

Black wrote again on January 29, 1976, stating that "resolution of all disputes" was his objective. In this letter he named Davis and Phillips for the first time during the exchange of correspondence, referring to them as part of the group who would "promptly appear in person for reinstatement." Harper immediately replied to Black by letter dated February 1, 1976, sent certified mail as before and reading:

[1] Respondent's brief raises subsidiary matters for treatment; namely, whether any gross backpay of Davis and Phillips during quarter 1976/I should be reduced by 5 weeks because they were on strike, and whether Phillips' gross backpay should be reduced on the basis of a workers' compensation award and otherwise reduced because of understated interim earnings during quarter 1977/IV. In further regard to Respondent's brief, I note two seeming inadvertencies, for which I read the date 1979, p. 3, l. 7, as 1976 and the date 1976, p. 9, l. 4, as 1975.

> This is in reply to your letter addressed to me dated January 29, 1976 with regard to the referenced Employer.
>
> The Employer's position with regards to reinstating employees who voluntarily walked off their jobs January 13, 1976 remains unchanged from that stated in my letter addressed to you dated January 21, 1976.
>
> Any employee named in your letter of January 14, 1976 will be accepted for work immediately provided work for which they are qualified is available and permanent replacements have not been hired. The same terms and conditions of employment that existed prior to January 13, 1976 exist today, and returning employees will be subject to those conditions.
>
> The Employer has no policy prohibiting re-hiring former employees who voluntarily quit their employment. Therefore, Mr. Phillips and Mr. Tim Davis are similarily urged to report for work.
>
> The Employer declines to meet with representatives of your Union for purposes of negotiations until such time as the matter concerning representation is properly resolved by the NLRB.

Picketing of unknown scope and regularity continued at Respondent's Yuba City premises until February 25, 1976, following which the initial complaint issued in this case raising, among other issues, the matter of whether Davis' and Phillips' discharges were "motivated by their union or protected, concerted activities." As further events unfolded on the underlying case, Black (later to retire) took no action to advise either Davis or Phillips of Respondent's February 1, 1976, letter. Ultimately, in mid-1977, the compliance officer for Region 20 furnished Davis a copy of this letter as an enclosure to her communication setting forth various legal principles from which she had concluded that the February 1976 offer was valid as to Davis (and implicitly as to Phillips).[2] Davis replied on August 19, 1977, with a letter seeking to "clarify" how he had not considered himself represented by Black for purposes of such rights as might have arisen from his termination by Respondent. On April 10, 1976, Respondent communicated unconditional written offers of reinstatement to both Davis and Phillips, which concededly tolled backpay at that point.[3]

In calculating backpay here, the assertedly "appropriate measure of gross backpay" is, with one exception, based on quarterly matching of all average earnings by those in the discriminatees' respective classifications. A special deviation is alleged for Davis wherein the claimed "unusual conditions resulting from a labor dispute" in quarter 1976/I causes that quarter (starting from January 5) to be equated with gross backpay for the next quarter using the ordinary formula. Respondent opposes this, arguing that simply because other helpers worked fewer hours during quarter 1976/I when a strike affected operations, is no reason to conclude that Davis would have earned more that the resulting averages. As to these helpers, Respondent proffers evidence that application of the average hours formula used otherwise would yield gross backpay of $624.60 for Davis in the disputed quarter.

Apart from such interim earnings as are conceded by the General Counsel, Respondent contends that any net backpay due these discriminatees should otherwise be further reduced on grounds they did not actively seek work following their discharges or at least did not do so with sufficient diligence. Here, Davis testified that he was continuously registered at a state employment office of the locale and periodically inquired at the union hall on a frequency of three times weekly for the first 3 months after being terminated. He otherwise sought work directly from various area employers in sawmill, moving and storage, transportation, and agricultural processing industries. This search for work continued after Davis acquired the part-time employment at the Yuba City Unified School District, which ultimately ripened into a full-time position with compensation exceeding that previously earned from Respondent. Phillips similarly testified that he was registered at the state unemployment office and visited the Union's office weekly. He described making numerous calls on trucking and construction firms of the vicinity but succeeded only in finding work at Antonini Brothers, Inc., with earnings concentrated mostly in quarters 1976/III and 1977/III.

Superimposed on needful resolution here of various issues commonly found in a backpay proceeding is the particular matter of Phillips' physical condition in relation to his former job with Respondent. His work there as a driver had commenced in 1974, when approximately aged 27, and involved regularly packing household items for shipment, loading and unloading furniture, moving heavy objects such as pianos and food freezers, and attendant driving of a tractor with trailer or flatbed to drop points, all in the course of what had typically been a 10-hour workday. Phillips testified to sustaining several work-related back injuries spaced through 1975. The most memorable to him was one incurred on September 11, 1975, while lifting. This caused him to be off work the balance of that month under treatment by local physician James Hamilton after which he resumed usual moving and lifting of heavy objects over the balance of his employment. He testified to experiencing mild discomfort over this final span and took nonprescription pain pills to avoid interference with his work. During later interim employment at Antonini Brothers his duties as a driver included comparable heavy lifting and moving exemplified by untraversed testimony that he

[2] Davis promptly showed this material to Phillips. On June 30, 1977, the compliance officer had similarly written in lengthy fashion to Black, retracing operative events of 1976 (in which the cessation of picketing was fixed as February 19, 1976) from which the controversial letter of February 1, 1976, was "deemed a valid offer of reinstatement" as to the discriminatees.

[3] The second amended backpay specification adopts that date as the end of Davis' backpay period. It recites that Phillips' backpay period had ended previously on November 15, 1977, based on the Regional Director's view of his physical inability to accomplish former required duties of a drive for Respondent. These allegations supplant the compliance officer's earlier determination on validity of job offers extended in the January-February 1976 period.

handled bins and vigorously winched down loads to a tightened state.

In 1977 Phillips initiated a series of workers' compensation claims. He was represented in this regard by Yuba City attorney Rudolf Ratkovsky. The defending carrier was Allstate Insurance Company represented by the Sacramento, California, law firm of Mullen & Filippi. On November 15, 1977, Phillips was examined at San Francisco by Gregory Bard, M.D., who rendered a written report to Ratkovsky 2 days later.[4] Dr. Bard outlined a patient history of several back injuries occurring February 27, 1975, as low back strain; June 17, 1975, as contusion of the lumbar area; and September 11, 1975, as a strained back leading to low back pain for which a certain Dr. Miller took X-rays showing congenital defects of the lumbosacral spine, leading to an opinion of sacroiliac strain with treatment consisting of an injection, daily heat therapy for 2 weeks, the fitting with a corset, and release for work. Dr. Bard noted the examinee's recollection of occasional episodes of back pain into January 1976 and that commencement of another truckdriving job in August 1976 was "more satisfactory as far as his back was concerned." Present complaints were intermittent low back pain becoming acute when twisting the trunk, carrying a heavy object, or with repetitive bending and lifting. Such pain sometimes lasts several days as to require bed rest and analgesics with occasional radiation of pain into the right leg but no awareness of weakness or numbness in the leg. Physical examination revealed a well-developed, well-muscled husky young man not demonstrating any obvious musculoskeletal deformities with bony landmarks and muscle development appearing symmetrical on standing. There was minimal tenderness over the right lumbosacral area while active trunk motion was normal and pain free. Tendon reflexes were active and equal with sensation intact and muscle power in the legs and trunk testing to normal. Heel and toe walking was done without difficulty, with straight-leg testing sitting and supine to 60/80 and Lasegue's sign negative. X-ray of November 15, 1977, revealed a bilateral defect of pars articularis at L5 with a Grade I spondylolisthesis of L5 on S1, the latter vertebra appearing to be transitional with partial lumbarization of the right transverse process and associated degenerative changes. Dr. Bard's opinion alluded to the increasing frequency and duration of periodic acute low back pain, finding in the present examination an "entirely normal" patient with no clinical signs of lumbar radiculopathy or musculoskeletal pathology. Findings from X-rays taken at the time did, in Dr. Bard's opinion, represent changes reflective of subjective symptomatology with bilateral defects in the pars articularis obviously representing instability at this level. Dr. Bard contrasted an X-ray report of September 1975 in which a Dr. Wankmuller mentioned no spondylolisthesis whereas current X-rays showed a Grade I slippage of L5 on S1 which as "a new development since then" substantiates the instability. Dr. Bard was negative on surgical intervention at the time but saw a spinal fusion indicated if the spondylolisthesis progressed. Phillips' condition was generally stationary with no further diagnostic or formal treatment measures indicated other than use of a corset and analgesics as needed. Dr. Bard classified the symptomatology as "moderate to severe when engaged in repetitive heavy lifitng, twisting and bending activities" which should be precluded upon any resumption of full-time employment.

On March 8, 1978, Phillips was examined at Sacramento by Richard C. Reiswig, D.C., who rendered a written report the following day to attorney Patrick S. Quinn of the Mullin & Filippi law firm. In this, Dr. Reiswig set forth a detailed patient history and review of medical records from original low back symptoms of February 1975. Examination showed Phillips moving with relative ease and fully free low back motions, although experiencing some discomfort on left lateral flexion. In orthopedic tests straight leg-raising was accomplished to 90 degrees and negative bilaterally with both Braggard's and Ely's test negative bilaterally. Reflexes of the lower extremities were equal and active bilaterally unreinforced, plus two with no sensorium deficit noted during Wartenberg testing in either leg. Phillips had no difficulty walking on heels and toes, hopping, squatting, or performing a sit up, although palpitation (but not percussion) did elicit tenderness over the lumbosacral area. Height and weight at the time were 5 feet, 8 inches tall and 191 pounds. Lumbar series plus a 30-degree cephalic view X-rays showed normal alignment of five lumbar vertebral bodies, but exhibiting a congenital anomaly of the first sacral segment with apparent lumbarization. A bilateral pars defect was exhibited at L5 with anterior slippage of that body over S1 indicative of a Grade I spondylolisthesis. Dr. Reiswig found Phillips permanent and stationary at the time with objective findings in the low back supportive of his subjective complaints. Phillips was deemed to have residual partial permanent disability precluding him between "no heavy lifting, repetitive bending or stooping and no heavy work." As a workers' compensation issue Dr. Reiswig deferred on the matter of apportionment until having an opportunity to review Dr. Wankmuller's X-rays taken September 11, 1975, noting their potential interrelationship with Dr. Bard's earlier report in terms of investigating whether the vertebral slippage had occurred after September 1975. This was done and Dr. Reiswig sent Quinn a supplemental report dated June 30, 1978, focusing on "discrepancy regarding what Dr. Wankmuller reported in reviewing X-rays on this patient in 1975, and Dr. Bard's comments regarding the same area in November 1977." Dr. Reiswig interpreted the 1975 films of the lumbar spine as exhibiting no more displacement than approximately 1/16 inch, while his of March 8, 1978, measured approximately 5/16-inch displacement of L5 over S1. This report concluded with an apportioning of residual disability factors, including a 30-percent portion "due to the microtrauma-

[4] With *Dorland's Illustrated Medical Dictionary*, Twenty-Fifth Edition, W. B. Saunders Company, 1974, as a source, the following medical definitions are noted:

spondylolisthesis—forward displacement of one vertebra over another, usually of the fifth lumbar over the body of the sacrum.

lumbarization—a condition in which the first segment of the sacrum is not fused with the second so that there is one additional articulated vertebra and the sacrum consists of only four segments.

radiculopathy—disease of the nerve roots.

tic nature of [Phillips] work requirements after September 11, 1975 and up until the present time."

On September 19, 1978, a workers' compensation judge issued his Findings and Award in Cases 77 SAC 58045, 78 SAC 60865, and 78 SAC 60875, all involving O. D. Phillips as "Applicant" versus Canova Moving & Storage and Allstate Insurance Company as "Defendant," and with a joint opinion on decisions appended.[5] The monetary award in the first two cases (other than for certain self-procured medical treatment, for litigation expense and for further medical treatment as required) was the identical amounts of $1,858.50 as "permanent disability indemnity" less $185 (in each case) payable as an attorney's fee, this on the basis of findings that the injury for which claim was made "caused permanent disability which, after apportionment, entitles applicant to 26.55 weeks of indemnity." Comparably the award in Case 78 SAC 60875 was for $2,693.25 less $270 payable as an attorney's fee on the basis of findings that the injury there caused permanent disability entitling applicant, after apportionment, to 38.475 weeks of indemnity. Underlying and related to these awards was a certain summary of evidence in the consolidated cases, filed by the judge July 31, 1978, and arising from a hearing conducted July 27, 1978, at which it was stipulated between the parties that Phillips "actual earnings at the time of injury were maximum for purposes of temporary and permanent disability" and that he had received temporary-total disability indemnity beginning September 15, 1975, to and including September 29, 1975, at the rate of $119 per week with no further temporary disability indemnity claimed.

With respect to fulfilling the Board's order of reinstatement, Respondent did not achieve valid offers until April 1978. The January 21, 1976, letter was only an item of business correspondence to the Union as part of labor management skirmishing,[6] but the February 1, 1976, letter is inadequate to establish an *unconditional offer*, wholly apart from the matter of whether binding on Davis and Phillips. As an employer's policy statement it was ambiguous and illusory, falling well short of the required standard. *Nameplate Manufacturers of America, Inc.*, 217 NLRB 518 (1975). Nor was Black shown to be an agent for either discriminatee, his role with the Union being an institutional one focusing on organizing employers and acquiring members. A clear showing of agency is necessary to allow bridging of what an offending employer should do directly. Cf. *Rafaire Refrigeration Corp.*, 207 NLRB 523 (1973). Here Respondent contented itself with a rather disingenuous written expression on a critical topic. It is shallow to argue that Black should have communicated the offer, for perforce Respondent should have effectively done so itself in direct, uncluttered manner.[7] Further grasping is shown by testimony concerning an unemployment compensation hearing of April 1976, for here both Davis and Phillips credibly denied that their attendance led to knowledge of any job offers running to them. I see enough reason to accept their testimony that while participating as claimants they did not intently follow the proceeding nor hear of particular letters extant and designed to constitute offers of reinstatement. Similarly, their rights survived the compliance officer's assessment of matters during 1977, for this administrative function is without impairment to their rights and undertaken well after Respondent's 1976 position had become stale. With this I approve the General Counsel's assertion that the backpay period for Davis commences on January 5, 1976, and ends on April 18, 1978, while that for Phillips commences on January 5, 1976, and, consistent with the special elaboration to be made below, ends on November 15, 1977.

It was established by evidence in this supplemental proceeding that Respondent's day-to-day utilization of its helper (also termed loader) classification was done without reference to seniority. For instance, should a particular moving job in progress have required a second day for completion this would ordinarily be done by that helper starting the job even though the additional day would be one in which a higher seniority helper might not have compensable hours for lack of work. This point is drawn in terms of the General Counsel's contention that "unusual conditions resulting from a labor dispute" so skewed quarter 1976/I that it warranted the fiction of establishing a measure of gross backpay for Davis associated to the immediately following second quarter. The issue is closely tied to dynamics of the underlying case, all as set forth in the Administrative Law Judge's Decision as adopted in short-form fashion by the Board. It is unnecessary to trace these details other than to observe that Respondent filed unsuccessful objections to the conduct of the election conducted on January 9, 1976, in which employees overwhelmingly voted for the Union, and that allegations respecting a "walkout" of Diadiw and seven other employees (four of them were helpers) were dismissed on grounds that no violation of the Act was shown by Respondent's reaction thereto. Payroll

[5] Simultaneously the judge issued his Findings and Order involving the same parties in Case 78 SAC 61223, holding that Phillips "did not sustain a injury arising out of and occurring in the course of employment as alleged herein."

[6] Respondent contends that remarks by General Manager William Smith occurring in January 1976 are germane to the reinstatement issue. Immediately after their discharges Davis and Phillips had returned to the capacity for 3 consecutive days until ordered off and away by Smith. On occasions during the next week or more Smith floated the idea to Phillips that reemployment might be possible with the assent of John Canova coupled to loss of seniority. Smith then telephoned an embellishment to the effect that Phillips must sign a statement of having quit, to which he demurred. Phillips testified that ultimately, on or about January 21, 1976, and in the presence of employee Nick Diadiw, Smith said simply that Respondent had "people waiting to take our places if we didn't come back, that we'd be permanently replaced." Smith denied this facet of the January maneuvering, testifying instead that on January 28, 1976, while speaking jointly to Phillips and Diadiw, he alluded without response to a forthcoming letter inviting both Davis and Phillips to return to work "unconditionally." I credit Phillips' denial that such a thought was ever voiced to him by Smith, believing instead that Respondent was at that point in time still avidly skirting an unequivocal offer to either of these discriminatees. Aside from the inherent probabilities in a situation of this kind, I note that such a claim was not previously made as Respondent pressed for validation of its posture during administrative dealings.

[7] The execution of union authorization cards by the discriminatees bears mentioning only to emphasize that no agency for this type of remedial objective is established. To hold otherwise would severely cloud the Board's resolute insistence that public policy is served best with firm and direct offers of reinstatement calculated to restore illegally affected persons to a former status as close as may be done.

records in evidence show that none of the four helpers of that persuasion returned to work after the pay period in which this walkout occurred and that their compensation for that week was recorded as "final." Further, there were new individuals hired to perform helper duties and as the General Counsel observes several of these had but insignificant employment during the quarter. While it is apparent that these overall events, including the discharge of Davis and Phillips, constituted a destabilizing effect on normal business routine, I see no reason to depart from generally consistent application of the chosen "adjusted average hours formula" that otherwise has tacit acceptance for purposes of this supplemental litigation. One can only speculate as to whether the filing of objections alone would have so infuriated organizer Black and the employee complement so as to have brought on some disruptive job action for that reason alone. However, the one concrete factor that must be looked to is that responding to Diadiw's leadership a substantial group of employees abruptly left their employment absent any unlawful conduct by Respondent in that regard and this led to a need for urgent shufflings and substitutions. On these grounds I am satisfied that the formula otherwise applicable to this case apply with respect to gross backpay due Davis for quarter 1976/I and that straight-time hours, overtime hours, and commissions paid in average fashion to all other helpers be factored against his own projected pay rate. Such a calculation is embarked upon by use of General Counsel's Exhibit 17, showing all such information for the quarter in dispute. However, in recognition of the practical effect that this disruption had, and to avoid an artificial result, I establish certain principles for the calculation.[8] Accordingly, I apply the data of this described exhibit to the ordinary backpay formula where any individual listed there worked at least 20 hours at straight time in a pay period, but providing that if commission earnings were over $50 then any number of hours would suffice, and providing further that for all individuals used in creating this measure of gross backpay the pay period ending January 5, 1976, is excluded. This leaves a total of 10 individuals who worked a total qualifying amount of 1,080 straight-time hours, therefore averaging 108 hours per person which multiplied by Davis $4 straight-time hourly rate yields $432. This same group worked a total qualifying amount of 108 overtime hours yielding an average of 10.8 hours multiplied by Davis' $6 overtime rate which yields $64.80. The total commissions paid this group during the quarter was $850 averaging $85 per person and I thus add together the figures $432, $64.80, and $85 to total $581.80 as Davis' gross backpay for quarter 1976/I.[9]

The issue of Phillips' physical ability for work caused the General Counsel to fix the end of his backpay period as November 15, 1977, when examination and medical history showed him clearly precluded from moving and storage tasks. While that medical opinion was rendered in the context of a workers' compensation proceeding, it was properly adaptable to principles governing reinstatement rights of discriminatees as guaranteed in the Act and served to extinguish those assertedly applying to Phillips up until that date. Respondent counters this with an argument that more significant interpretation should be placed on Dr. Bard's opinion and, more importantly, on the basis of testimony from Dr. Reiswig that given the opportunity to have done so in September 1975 he would at that time have precluded Phillips from returning to work with Respondent.[10] Dr. Reiswig analyzed Phillips' low-back problem of one of twin instabilities, one being the spondylolisthetic break in the posterior spinal arch and the second a congenital instability of his sacrum. Dr. Reiswig agreed generally with the opinion of Dr. Bard noting its consistency with his own view that there had been a developing migration to the low-back instability based on the work requirements of a furniture mover and a truckdriver ("insults"), with the spinal displacement widening from one-sixteenth of an inch in 1975 to one-fourth of an inch by late 1977. Dr. Reiswig testified that such occupational activities as Phillips undertook subsequent to September 1975 were achieved through the risky process of "masking" his condition to himself by use of a supporting corset and analgesics.

While Dr. Reiswig's reports and testimony were not contradicted by medical evidence advanced on the General Counsel's behalf, they are far from dispositive of the issue. I give ample weight to Dr. Reiswig's competence as a witness, but believe other factors are more significant. In terms of physical ability to perform arduous work, it is primarily noteworthy here that Phillips' substantial employment at Antonini Brothers during summer 1977 did not merely involve driving a truck but required him to move fruit-filled bins.[11]

[8] Extreme artificiality would arise by including the individual named Gilmore, who worked only 1 day and earned $3 during this quarter. This is only illustrative of why the chosen principles will yield a more reasonably accurate reconstruction of what Davis would have earned during that quarter but for Respondent's unlawful termination of his employment.

[9] I recognize that this amount is lower than the $620.60 total calculated in Respondent's brief, p. 18. However, I find that calculation unfathomable and not worthy of attempted reconciliation. As only a brief illustration I note that it asserts seven employees worked 519.50 straight-time hours and 25.40 overtime hours in January, whereas the more evident arithmetic, using the seven most likely individuals in question, would yield 650 straight-time hours and 40 overtime hours, respectively. In briefing this issue the General Counsel relied on *Trinity Valley Iron and Steel Company*, 158 NLRB 890 (1966). I find this case distinguishable because there the issue was an extraordinary number of replacements kept on after strikers returned to work, thus causing them fewer hours since spread out widely. In adopting the General Counsel's curative formula as "reasonable and appropriate," the Board did approve an exclusion of weeks when, after reinstatement, the particular pattern of hours worked, the complicating practice of paying commission earnings to helpers, and the fact that 20 hours is exactly one-half of a traditional 40-hour workweek. It is also noteworthy that the Board observed in *Trinity Valley, supra*, how no formula "can precisely measure the exact amount of work of which each discriminatee was deprived," but that the formula actually composed was "reasoned and workable."

[10] In regard to Dr. Reiswig's testimony I correct the transcript by adding the word "inch" before the word "displacement," p. 127, l. 21 (noting in the process that Dr. Reiswig refined this approximation, p. 144, l. 5, to "four-sixteenths" of an inch), and by changing the word "rate" to the word "rare," p. 145, l. 16.

[11] The workers' compensation judge's summary of evidence recites that Phillips hauled tomato tubs but did not participate in loading and unloading of fruit bins, at least as such was performed with forklifts. I find this

Continued

Motivational factors are always germane in the conceptual realm of disability from employment, and here that factor is favorable toward Phillips as one who both returned to work at Respondent following September 1975 and moved furniture without significant trauma over the next 3 months, as well as engaged in arduous agricultural processing work over a year later. Additionally, it is significant that Phillips' workers' compensation claims arose not because he was spontaneously so inclined, but only because of a visit to his attorney's office for the purpose of gaining clarification of his rights as a beneficiary under the Act. Finally, I note that Dr. Bard referred to the trauma of September 1975 as Phillips' "worst episode," and that his condition was "stationary" as of 1977 denoting that his ability to perform physically demanding duties was little changed from the many months preceding.[12]

While the medical evidence on this issue would support a finding that Phillips was disabled for reinstatement purposes prior to November 15, 1977, and it is impossible to say what success he would have had if continuing (or resuming) work with Respondent after January 1976 in view of his low-back problems as manifesting in an ultimate workers' compensation award, I nevertheless find that the evidence as a whole fails to establish that his physical condition was so disabling as to disqualify him from any reinstatement rights as such arose and ran until at least November 15, 1977.

In briefing this issue, Respondent discusses *The Dayton Tire & Rubber Company*, 227 NLRB 873 (1977), and *K-Mart Corporation*, 244 NLRB 547 (1979), cases, arguing too that the General Counsel has failed to point at a single intervening event between January 1976 and November 1977 to rebut medical opinion that Phillips was disabled. On this latter point an obvious intervening event was employment at Antonini Brothers, thus rendering this branch of Respondent's contention as unavailing. Respondent argues that *Dayton* is analogous to the instant matter, but I find any analogy strained at best. The case underlying that Supplemental Decision and Order, reported at 216 NLRB 1003 (1975), involved a finding that Paul Grammont was pretextually discharged in the context of a back injury sustained at work with attendant medical examination and expectation as to when he might resume his job. This was all set forth in great detail in the originating proceeding, and the *Dayton* decision cited here was one peculiarly concerned with how to apply a State Industrial Court award grounded on a 27.5-percent permanent disability to the body as a whole for unrestricted manual labor. The resolution of that point did not satisfy the United States Court of Appeals for the Tenth Circuit when appeal was taken there, and to that extent the Board's order affirming general terms of reinstatement and backpay for Grammont was not enforced in a modification essentially rooted in the court's view that the precise question of establishing a backpay period had not been fully litigated. *Dayton Tire & Rubber Co.* v. *N.L.R.B.*, 591 F.2d 566 (10th Cir. 1979).[13] I find little guidance from *Dayton* or from *K-Mart* in which the Board pronouncedly scored that respondent for inconsistent positions on a disability issue.[14] The more convincing weight of evidence is to the effect that Phillips' physical condition was not of a disabling nature for purposes of a continuing right of reinstatement, until the making of a valid offer or the point eventually reached in November 1977 when concededly this was the impact of his impairment.

On the issue of diligently searching for work, Davis is faulted because of spotty interim employment until he secured a custodial position with the Yuba City Unified School District in the fall of 1976, and on grounds that his written compliance reports prior to that time only showed an affirmative seeking of work on nine particular dates and no indication of having done so thereafter. Again I give weight to such evidence, but am more strongly impressed with Davis' testimony that he regularly and sincerely sought employment in the vicinity and attempted to augment his initial part-time employment at the school district with additional income or a substituted full-time position. Davis testified clearly that the questionnaire type reports submitted periodically to the compliance officer were done perfunctorily and ultimately simply disregarded. I find this to be a rather natural human trait, and in view of Respondent's burden of proof in this area I discount that phase of the evidence. His testimony of using newspapers and the union office as a source of prospective employment is persuasive, as is his explanation that many more firms were visited than he chose to record. Davis did attend college on a part-time basis during quarter 1976/IV, however, there is no evidence that this significantly reduced his customary efforts at seeking any available work. For these reasons his personal contribution toward mitigation of damages was fulfilled.

As to Phillips, his interim earnings were concentrated in a much more limited time frame than for Davis, and Respondent accuses him of working "only in the summer months" while obviously not otherwise seeking employment. Phillips testified in credible, uncontradicted fashion to a persistent search for work, in which he regularly registered at the union hall for any available employ-

somewhat corroborative of Phillips' testimony on the general matter of whether heavy lifting and carrying tasks were required of him at Antonini Brothers (the ambiguity here being that he had denied even touching tomato tubs), and I observe that on this matter for which Respondent has the burden of proof no attempt was made to educe evidence of work processes as they would affect a truckdriver with that interim employer.

[12] Dr. Bard has been certified in physical medicine and rehabilitation since 1954. Directory of Medical Specialists, American Medical Specialty Boards, 19th ed., 1978-79, vol. 2, p. 2541. Referring to a Board-certified specialist in an action under 42 U.S.C. para. 405(g) to review a denial of disability benefits by the Secretary of Health, Education and Welfare, a United States district judge wrote, "It is proper for the Secretary to give greater weight to the opinion of a physician specializing in the field in which the plaintiff's impairment lies than to an opinion of plaintiff's general practitioner." *Slone* v. *Richardson*, 325 F.Supp. 1116 (1971).

[13] Interestingly, the court's recitation of jobs performed by Grammont following the permanent disability award included that of working "for a furniture company building, moving and lifting furniture weighing up to 450 pounds." Noting the substantial permanent disability found to be present in that situation, I observe that this harmonizes with my earlier discussion as to the significance of the motivational factor in securing and fulfilling physically stressful occupations even though one may have a medically determinable impairment.

[14] The Board's decision in *K-Mart* may be better comprehended by reading the word "fitness" as "unfitness" in 244 NLRB at 548.

ment. His cross-examination on this issue was done as Respondent's counsel had available a personally marked calendar on which Phillips had noted places of inquiring for work, and I note that his interim employment at Antonini Brothers was acquired the first time after he devoted a week's free time to learning their operations and ingratiating himself as an enthusiastic applicant.[15] Under all these circumstances, and considering Phillips' primary occupational background as a truckdriver, I find his diligence in seeking work was fully adequate to avoid any reductions to gross backpay.

A primary offset argued for by Respondent is grounded on the workers' compensation award that Phillips received. Here Respondent relies on *American Manufacturing Company of Texas*, 167 NLRB 520 (1967), in arguing that such be an appropriate reduction from gross backpay.[16] In *American Manufacturing* the Board felt impelled to change a general corollary under which workmen's compensation payments were not considered as interim earnings deducted from gross backpay. The Board found it would henceforth be proper to deduct such compensation payments "insofar as they constitute payment for wages lost." The Board noted how awards of workmen's compensation ordinarily consist of two components, "one being a payment for lost wages and the other being reparation for physical damage suffered." The heart of the principle being enunciated was (167 NLRB at 521):

> . . . where backpay is awarded for the same period for which wages have already been replaced in part, to continue to hold the wage portion of the award to be nondeductible would result in double payment to the employee for that period, and hence this part is more accurately regarded as deductible interim earnings. However, the portion of the award which is reparation for physical damage suffered is unrelated to wages earned, does not result in double wage payment to the discriminatee, and continues to be excludable from interim earnings.

The Board footnoted this passage by referring to discussion of the court "concerning the deductibility of workmen's compensation payments" in *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693 (5th Cir. 1965), enfg. 151 NLRB 1352. Since the Board expressly alluded to the court's rationale on this point, I set forth the following passages of the *Melrose* opinion in which the Board's Order, except as is immaterial here, was enforced (351 F.2d at 700–701):

The supplemental back pay order dated March 31, 1965, concluded that Miss Thielen was entitled to $2,383.62 gross back pay. From this sum was subtracted interim earnings of $300 which were received from employment in her father's locker plant. Also deducted was a sum of $122.51 representing that portion of gross back pay accruing during a period of disability. Melrose contends that there should have been additional deductions of (1) room and board, (2) earnings at Mullner Tavern, and (3) a workmen's compensation award.

* * * * *

Finally, it appears that Miss Thielen injured two of her fingers while working at her father's locker plant. She was awarded a sum under the provisions of the Minnesota Workmen's Compensation Act. Relying on the case of *N.L.R.B.* v. *Moss Planing Mill Co.*, 224 F.2d 702 (4th Cir. 1955), Melrose contends that this award of workmen's compensation must be deducted. It is true that this case held that an employer was entitled to a deduction of the amount of workmen's compensation paid to an employee. Under the circumstances, however, we do not feel that we should be bound by this holding.

The workmen's compensation award to Miss Thielen represented two things; one, repayment for earnings lost during the disability, and two, reparation for the partial loss of two fingers. The amount representing lost earnings had already been deducted from the gross back pay figure and is not reflected in the net award. Therefore, to allow a second deduction representing compensation attributable to lost income for the same period of time would result in an unfair double deduction.

The balance of the award represented reparation for the partial loss of two fingers. We feel likewise, that this amount should not be deducted. In a back pay determination, the Board has broad discretion to determine the proper amount of the award. The Board's goal should be to make the employee "whole." We do not believe the amount of the workmen's compensation attributable to a reparation for the injured fingers should be equated with wages and allowed as a deduction. This compensation was made pursuant to the broad social policy of the state to relieve disabled workers from the results of their injuries. The award did not represent wages or a substitute therefor, but was an attempt to compensate for the loss of a member of the body. This is not a recovery for which the employer is entitled to take advantage.

This issue was not briefed by the General Counsel, however the principle is stated with sufficient clarity in *American Manufacturing*. The perplexing question is how it should be applied when underlying facts do not necessarily show unassailably that some portion of a workmen's compensation award is to represent lost wages. Additionally, it must be borne in mind that discriminatees should not suffer unduly and any needful balances to

[15] These efforts contrast with supplemental backpay disposition showing a cavalier search for work, claimant's representation of ability only to peform light duty, inconclusive medical reports as to lower back infirmities and a collateral civil law suit alleging "servere and permament injuries." *Transportation Workers Union, Local 512 (Allied Maintenance Company)*, 204 NLRB 1144 (1973).

[16] Respondent's brief states that Phillips "received an award of $1,858.50 in Case No. 77 SAC 68865 and $2, 693.25 in Case No. 78 SAC 60875" thus totaling $4,551.75. I must rely on the plain meaning of the record and find from composite content of Resp. Exh. 2 that it has misnumbered workers' compensation Case No. 77SAC 60865 and has inadvertently failed to note the additional $1,858.50 (less attorney's fee) award in 77 SAC 58045. I thus treat the workers compensation judge's disposition as yielding a total monetary award of $6,410.25, less total attorney's fees of $640, resulting in the net amount of $5,770.25.

be struck must not enrich a violator of the Act. In this situation I am persuaded that the workers' compensation award to Phillips was designed to replace wages he reasonably had lost after work-induced aggravation to a low-back condition that was both congenitally weak and otherwise unstable from traumatic forces. In each case the award was related to a specific weekly span of indemnity and collectively associated with the voluntary temporary disability paid to Phillips by Respondent in late September 1975. In these circumstances, I conclude that as adjusted below the award was within the doctrine of *American Manufacturing*, and thus an appropriate offset to net back wages should result. Cf. *Great Atlantic and Pacific Tea Company, Incorporated*, 244 NLRB 1097. Again I must give fair meaning to the record as a whole, and here the subject of apportionment was methodically set forth in Dr. Reiswig's letter of June 30, 1978, this in turn being expressly alluded to in the workers' compensation judge's joint opinion on Decisions as the matter of Phillips' "overall permanent disability and the portion attributable to each of the three injuries . . . as set forth in the rating reports served concurrently on August 9, 1978, to which the parties have made no objection." The difficult question is just what timespans are to be presumed covered by this apportioned award for purposes of inclusion or exclusion within or from the backpay period. The workers' compensation judge's summary of evidence and joint opinion on decisions have several significant passages from which the dilemma may reasonably be resolved. The judge knew that Phillips' job with Respondent had previously "ended," and that "January, 1976" was a point in time to express as to when the taking of particular pain medication commenced. He noted that Phillips "now is employed at Antonini Trucking Company," and that "during the off season [ostensibly past ones] . . . draws unemployment." The conclusion I apply here is that in chronological terms the awarded weeks of indemnity began with Phillips' discharge of January 5, 1976. The 91.575-week period of the three awards added together runs until November 3, 1977, however I extend this for the estimated 30 weeks in which Phillips had interim employment at Antonini Brothers, Inc., during 1976 and 1977 to reach June 1, 1978. The extension is made constructively, on the assumption that "permanent disability" would not logically pertain to a period of full-time, gainful employment. I construe the situation as follows: (1) that only 85 percent (30 percent plus 20 percent plus 20 percent plus, arbitrarily, one-half of 30 percent) of the disability award relates to Respondent, which when multiplied by the $5,770.25 net proceeds results in $4,904.70, but (2) the period between November 15, 1977, and June 1, 1978, should be excluded from this downward adjustment because it is totally outside the backpay period. This means that for the period of 28.42 weeks just described, an approximate 31-percent portion is represented when compared to the overall 91.575 weeks of the three awards added together. Thus, I multiply this resultant 69-percent balance times $4,904.70 and reach $3,384.25 as the final amount to be deducted from Phillips' overall net backpay under principles of *American Manufacturing*. All backpay concepts key to the quarterly method of computation, therefore the $3,384.25 must be appropriately distributed among quarters. Since all quarters to which this deduction pertains were without interim earnings (except for a relatively small amount in 1976/IV), I apportion it arbitrarily as $750.50 in each of the quarters 1976/I, 1976/II, 1977/I, and 1977/II, and the residual $384.25 to 1976/IV.

Several final adjustments are in order. As conceded by the General Counsel the amount of $490 should appear as interim earnings for Phillips during quarter 1976/I. I resolve discrepancy as to net interim earnings for Phillips during quarter 1977/IV by selecting the more authoritative recording of earnings as filed for unemployment compensation purposes, and accept this figure of $656.13 rather than the lower amount $516.67 set forth in the backpay specification, and as to which the General Counsel did not fulfill an "address[ing]" of the point. Davis testified that he was paid by the Union for picketing "at different times" at a weekly rate of $37, and that it seemed to him Phillips and others were similarly compensated. I do not disturb any computation relating to Phillips on this conjectural basis, but as to Davis do presume at least a plural implication to what he described and increase his interim earnings for quarter 1976/I by two such payments for the sum of $74.[17]

Accordingly, as to Davis I modify Appendix B to the backpay specification by finding his gross backpay for quarter 1976/I to be $581.80 with additional interim earnings of $74, resulting in net backpay of $332.80 and a corresponding reduction in his total backpay principal to $7,953.26. As to Phillips I modify Appendix C of the backpay specification by finding that in quarter 1976/I he had additional interim earnings of $490 resulting in net backpay for that quarter of $1,144.74, and that interim earnings for quarter 1977/IV were $656.13, resulting in net backpay there of $949.39. Total backpay principal for Phillips resulting from these adjustments and from constructive quarterly allocation of the workers' compensation disability indemnity is $9,359.76, plus reimbursable medical and dental expenses admittedly due him of $65.60.

RECOMMENDED ORDER

I conclude that Respondent's obligation to Davis is the sum of $7,953.26 and to Phillips is the sum of $9,425.36, in both instances to be paid with interest as appropriately fixed and compounded. For clarity I attach quarterly tabulations underlying these final amounts due Davis and Phillips as Appendix A and B of this Supplemental Decision, respectively.

[17] In cross-examining Davis, Respondent traversed various aspects of the work-related expenses which he claimed. In view of having admitted such expenses in its answer to the second amended backpay specification, I leave this matter without change.

APPENDIX A - Phillips

Year/Qtr.	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
1976/I	$ 581.80	$399.00	$150.00	$249.00	$ 332.80
1976/II	2,478.29	0	0	0	2,478.29
1976/III	2,236.68	417.75	130.00	287.75	1,948.93
1976/IV	2,227.15	1,135.59	0	1,135.59	1,090.56
1977/I	1,086.23	1,089.00	27.00	1,062.00	24.23
1977/II	1,665.77	1,031.04	15.00	1,016.04	649.73
1977/III	1,295.22	1,509.67	15.00	1,494.67	0
1977/IV	2,547.66	1,144.22	15.00	1,129.22	1,418.44
1978/I	1,793.55	2,134.87	15.00	2,119.07	0
1978/II	402.68	392.40	0	392.40	10.28
TOTAL BACKPAY:					$7,953.26